

No. PD-0228-17

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
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ABEL ACOSTA, CLERK

THE STATE OF TEXAS, Appellant

v.

JOSE LUIS CORTEZ, Appellee

Appeal from Potter County

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

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NAMES OF ALL PARTIES TO THE TRIAL COURT’S JUDGMENT

*The parties to the trial court’s judgment are the State of Texas and Appellee, Jose Luis Cortez.

*The case was tried before the Honorable Douglas Woodburn, 108th District Court, Potter County, Texas.

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STATE’S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

It is funny how something as seemingly insignificant as a white line can cause so much trouble. Yet the white “fog line” on the right-hand side of the roadway forms the basis for innumerable traffic stops and, recently, two other granted petitions for discretionary review.¹ This case presents an opportunity to interpret the applicable law and give guidance to officers, lawyers, and judges alike.

STATEMENT OF THE CASE

Appellee was stopped for driving on an improved shoulder in violation of Texas Transportation Code section 545.058(a) and arrested for possession with intent

¹ *State v. Cortez*, 501 S.W.3d 606 (Tex. Crim. App. 2016); *State v. Hernandez*, PD-1380-16 (granted 3/29/17).

to deliver. The trial court granted appellee’s motion to suppress, concluding that the officer had no reasonable suspicion of a violation because appellee drove on the white “fog line,” not beyond it. The court of appeals agreed, holding that driving on the “fog line” is not driving on the shoulder.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument was neither requested nor granted.

ISSUE PRESENTED

Does the improved shoulder of a highway begin at the inside edge of the “fog line,” the outside edge, or somewhere in between?

STATEMENT OF FACTS

While following appellee on Interstate Highway 40,² State Trooper Snelgrooes observed what he believed to be two violations of section 545.058(a), “Driving on Improved Shoulder.”³ After reviewing the video, the trial court found that, on each occasion, “the right rear tire (or its shadow) was observed by the Court to come in the proximity of and possibly touch the inside portion or more of the white line delineating the roadway from the improved shoulder[,]”—the “fog line”—but there was no evidence that appellee’s vehicle “pass[ed] outside the outermost edge of the

² 1 CR 70 (Finding of Fact 7).

³ 1 CR 71 (Finding of Fact 9).

fog line.”⁴ It concluded that “[c]rossing over the portion of the fog line nearest the center of the roadway or upon the fog line is not a violation of Texas traffic law” because “[t]he improved shoulder of a state roadway begins at the point of the fog line which is furthest from the center of the roadway.”⁵ “[T]he vehicle was not operated on the improved shoulder of the roadway” and so appellee was “unlawfully stopped and detained.”⁶

SUMMARY OF THE ARGUMENT

The “fog line” marks the edge of the lane of travel—not the beginning of the edge—and, thus, the beginning of the improved shoulder. This conclusion flows from the plain language of the applicable statutes read in conjunction with the Texas Manual on Uniform Traffic Control Devices. It is also the most compatible with the related statute on failure to maintain a lane. Moreover, making the “fog line” part of neither the roadway nor the shoulder would be absurd.

⁴ 1 CR 71 (Findings of Fact 11, 12). *See also* 1 CR 72 (Conclusion of Law 22). The court of appeals says the trial court assumed *arguendo* that appellee drove on the “fog line” and “hedged its finding by indicating that . . . the possibility of a touch may exist.” *State v. Cortez*, 512 S.W.3d 915, 2017 Tex. App. LEXIS 999 at *8, 21 (Tex. App.—Amarillo Feb. 3, 2017). Trial courts do not hedge or make findings of alternative fact. Viewed collectively, the trial court 1) did not find that the tires did not touch the “fog line,” 2) did find that Snelgrooes stated he believed he witnessed two violations of section 545.058 (1 CR 71 (Finding of Fact 9)), and 3) did find that, on both occasions, the video arguably supported Snelgrooes’ testimony.

⁵ 1 CR 72 (Conclusions of Law 21, 22).

⁶ 1 CR 72 (Conclusions of Law 22, 25). The trial court also found that driving on the shoulder on both occasions would have been justified. 1 CR 72 (Conclusions of Law 23, 24).

ARGUMENT

I. The only issue is whether the “fog line” is part of the shoulder.

Appellee was detained on suspicion of violating Transportation Code section 545.058(a). It provides, “An operator may drive on an improved shoulder to the right of the main traveled portion of a roadway if that operation is necessary and may be done safely, but only [for one of seven enumerated reasons].”⁷ This Court has construed this statute:

[T]he offense of illegally driving on an improved shoulder can be proved in one of two ways: either driving on the improved shoulder was not a necessary part of achieving one of the seven approved purposes, or driving on the improved shoulder could not have been done safely. Merely driving on an improved shoulder is not prima facie evidence of an offense. Thus if an officer sees a driver driving on an improved shoulder, and it appears that driving on the improved shoulder was necessary to achieving one of the seven approved purposes, and it is done safely, that officer does not have reasonable suspicion that an offense occurred.⁸

The issue in this case is whether the “fog line” is part of the shoulder, not whether the statute was violated or even whether the officer could have reasonably believed it was based on all the circumstances. The court of appeals affirmed only the trial court’s conclusion that appellee did not drive on the shoulder.⁹ It did not

⁷ TEX. TRANSP. CODE § 545.058(a).

⁸ *Lothrop v. State*, 372 S.W.3d 187, 191 (Tex. Crim. App. 2012).

⁹ *Cortez*, 512 S.W.3d 915, 2017 Tex. App. LEXIS 999 at *23-24.

address the trial court's alternate conclusions that appellee's encroachments were necessary to allow the officer to pass in the neighboring lane and make a right turn onto the exit ramp, respectively.¹⁰

II. Rules for statutory construction

Statutes are interpreted to effectuate the “collective” intent or purpose of the legislators who enacted the legislation.¹¹ The focus is on the literal text of the statute because that is the only thing that was enacted; the Legislature is constitutionally entitled to expect that the Judiciary will faithfully follow it.¹² Words not defined in the statute are used in their ordinary and common sense meaning drawn from dictionary definitions or, if it is a legal term, from legal dictionaries.¹³

Where the statute is clear and unambiguous, the Legislature must be understood to mean what it has expressed, and it is not for the courts to add or subtract from such a statute.¹⁴ Importantly, the ability to interpret a term so as to achieve a more desirable result does not make that term ambiguous. “As the

¹⁰ See TEX. TRANSP. CODE § 545.058(a)(3), (5). The State argued in the court of appeals that the moves were not justified. State's CoA Br. at 7-8. That court should consider it first.

¹¹ *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991).

¹² *Id.*

¹³ *Prudholm v. State*, 333 S.W.3d 590, 594 (Tex. Crim. App. 2011); *Ex parte Rieck*, 144 S.W.3d 510, 512 (Tex. Crim. App. 2004).

¹⁴ *Boykin*, 818 S.W.2d at 785 (citation omitted).

law-interpreting branch of government, the judiciary is not empowered to substitute what it believes to be right and fair for what the Legislature has written, even if the statute seems unwise or unfair.”¹⁵

The only legitimate exception to following the plain language is where it “would lead to absurd consequences that the Legislature could not *possibly* have intended.”¹⁶ Only then, out of absolute necessity, is it constitutionally permissible for a court to consider extratextual factors.¹⁷

III. The Legislature provided the answer.

The court of appeals was correct that “fog line” and “solid white line” “appear nowhere in [the applicable Transportation Code definition section] or § 545.058 of the Transportation Code.”¹⁸ But it was wrong to end its search and read “boundary” into the statute.¹⁹ The Legislature provided the means to resolve the issue through a combination of statutes and legislatively mandated guidelines.

¹⁵ *Tamez v. State*, 11 S.W.3d 198, 203 (Tex. Crim. App. 2000) (Keller, J., dissenting).

¹⁶ *Boykin*, 818 S.W.2d at 785 (ital. in orig.).

¹⁷ Although section 311.023 of the Texas Government Code invites, but does not require, courts to consider extratextual factors when the statute in question is not ambiguous, such an invitation should be declined out of respect for the lawmaking powers of the legislative branch. *Id.* at 786 n.4.

¹⁸ *Cortez*, 512 S.W.3d 915, 2017 Tex. App. LEXIS 999 at *9.

¹⁹ *Id.* at *10.

The Transportation Code

A “highway” is “the width between the boundary lines of a publicly maintained way any part of which is open to the public for vehicular travel.”²⁰ It includes both a “roadway” and a “shoulder,” and those two are defined in relation to each other. A “roadway” is “the portion of a highway, other than the berm or shoulder, that is improved, designed, or ordinarily used for vehicular travel.”²¹ The “shoulder” is “adjacent to the roadway” and “not intended for normal vehicular travel.”²² At issue here, the shoulder is “distinguished from the roadway by different design, construction, or marking.”²³ Unfortunately, the Code does not define “marking.”

The Texas Manual on Uniform Traffic Control Devices

Fortunately, the Texas Manual on Uniform Traffic Control Devices (Manual) does. To secure federal funding and promote uniformity and safety, the Legislature directed the Texas Transportation Commission to adopt a manual and specifications for traffic-control devices consistent with the Transportation Code and the federal

²⁰ TEX. TRANSP. CODE § 541.302 (5).

²¹ TEX. TRANSP. CODE § 541.302 (11).

²² TEX. TRANSP. CODE § 541.302 (15)(A), (B), (D). An “improved shoulder” is one that is paved. TEX. TRANSP. CODE § 541.302 (6).

²³ TEX. TRANSP. CODE § 541.302 (15)(C).

system.²⁴ The 2011 Texas Manual on Uniform Traffic Control Devices (Revision 2) is that manual.²⁵ It is “incorporated by reference in the Texas Administrative Code, Title 43, Section 25.1 and shall be recognized as the Texas standard for all traffic control devices installed on any street, highway, bikeway, or private road open to public travel”²⁶ This Court has referred to it on multiple occasions.²⁷ It should do so again.

Part 3 of the Manual is entitled “Markings.” It says that solid white lines along the right side of the roadway “delineate” its “edge.”²⁸ The Manual also says that solid

²⁴ TEX. TRANSP. CODE § 544.001. *See* TEX. TRANSP. CODE § 544.002(a) (“[T]he Texas Department of Transportation may place and maintain a traffic-control device on a state highway as provided by the manual and specifications adopted under Section 544.001.”). *See also* 23 USC §§ 109, 402 (outlining the thrust of the federal highway program).

²⁵ <http://ftp.dot.state.tx.us/pub/txdot-info/trf/tmutcd/2011-rev-2/revision-2.pdf> (Manual p. v. (certification)) (last visited May 24, 2017).

²⁶ Manual p. I-1 (paragraph 02).

²⁷ *Abney v. State*, 394 S.W.3d 542, 549 (Tex. Crim. App. 2013) (“The purpose of regulatory signs is to provide drivers with notice of traffic laws or regulations. According to the Texas Manual on Uniform Traffic Control Devices, these signs are required to be installed at or near where the regulations apply.”); *Rickels v. State*, 202 S.W.3d 759, 760 n.1 (Tex. Crim. App. 2006) (“We note that Section 7B.08 of the 2003 Texas Manual on Uniform Traffic Control Devices (MUTCD) requires that a school-zone sign be installed not less than 150 feet or more than 700 feet ‘in advance of the school grounds or school crossings.’”).

²⁸ Manual §§ 1A.13.03(58)(p. 13) (“Edge Line Markings—white or yellow pavement marking lines that delineate the right or left edge(s) of a traveled way.”), 3A.05.02(B) (p. 370) (“When used, white markings for longitudinal lines shall delineate: . . . B. The right-hand edge of the roadway.”), 3B.06.04 (p. 393) (“If used, right edge line pavement markings shall consist of a normal solid white line to delineate the right-hand edge of the roadway.”).

white lines are meant to discourage or prohibit crossing.²⁹ This is consistent with the common definition of “edge,” which is “a line or border at which a surface terminates.”³⁰

IV. Three options but only one good choice.

Although the consequences of this language appear plain, there are conceivably three options.

The line marking the edge of the roadway is on the roadway.

The first is that the “fog line”—which marks where the roadway ends—is on the roadway. This is inconsistent with the concept of an edge and the purpose of the “fog line.” If the roadway terminates at a painted line intended to discourage or prohibit crossing, it cannot continue beyond it.

The line marking the edge of the roadway is next to the roadway on the shoulder.

The second is readily extrapolated from the Code and Manual. If 1) nothing past the roadway’s edge can be on the roadway, 2) an edge must be adjacent to what

²⁹ Manual §§ 3A.06.01 (p. 370) (“A solid line discourages or prohibits crossing (depending on the specific application)[.]”), 3B.04.20 (p. 384) (“Where crossing the lane line markings is discouraged, the lane line markings shall consist of a normal or wide solid white line.”). *See also id.* at § 3B.04.30 (p. 392) (“Where crossing the lane line markings is prohibited, the lane line markings shall consist of a solid double white line.”).

³⁰ THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (Unabridged Ed. 1971) at 453. The definition of “edge” in the dictionary preferred by the court of appeals is “the line where an object or area begins or ends.” <http://www.merriam-webster.com/dictionary/edge> (“Full Definition” 2a) (last visited May 24, 2017).

it delineates, and 3) the shoulder is, by definition, adjacent to the roadway, then the “fog line” must be painted on the shoulder. To drive onto it is to drive onto the shoulder.

The line marking the edge of the roadway is not on either adjacent part of the highway.

The third option, chosen by the court of appeals, is absurd. Because that court did not use the Manual, it based its analysis on its chosen term “boundary” rather than “edge,” and likened the situation to passing between two States.³¹ It concluded:

[O]n one side [of the ‘fog line’] lies the lane of traffic while on the other lies the improved shoulder. . . . Until a portion of the vehicle driven by [appellee] crossed beyond the ‘fog line’ from the area known as his lane of traffic to the area known as the improved shoulder, it cannot be said that he drove on an improved shoulder.³²

If one cannot go from the roadway to the shoulder without passing through the boundary separating them, the same must be true moving the other direction. That means the “fog line” is between the roadway and shoulder but part of neither. Not only does this ignore the statute placing the shoulder adjacent to the roadway, it creates a four-inch-wide neutral zone that is not part of a “highway” as defined by the Legislature. That is absurd.

³¹ *Cortez*, 512 S.W.3d 915, 2017 Tex. App. LEXIS 999 at *10-11.

³² *Id.* at * 10.

Keeping the roadway separate from the line marking its edge is consistent with safely maintaining a lane.

The conclusion that a roadway's painted edge line cannot be part of the roadway is bolstered when the related statute commonly referred to as "failure to maintain a lane" is considered.

Transportation Code section 545.060 provides, "An operator on a roadway divided into two or more clearly marked lanes for traffic: (1) shall drive as nearly as practical entirely within a single lane; and (2) may not move from the lane unless that movement can be made safely."³³ A plurality of this Court recently declined to answer whether "driving on the [center] divider stripes constitute[s] a failure to stay 'entirely within' a designated lane[,]"³⁴ but the Manual suggests the answer. Just as white lines delineate the right-hand edge of the roadway, yellow lines delineate the left-hand edge of the roadways of divided highways.³⁵ If driving on—but not beyond—the center yellow line is not a failure to stay within one's lane, it must be because it is part of the lane. But if it is part of one opposing lane of traffic, it is part of both. The result is that two oncoming vehicles driving on the same broken yellow

³³ TEX. TRANSP. CODE § 545.060(a).

³⁴ *Leming v. State*, 493 S.W.3d 552, 561 (Tex. Crim. App. 2016).

³⁵ Manual § 3A.05.03 (p. 370). *See also id.* at 1A.13.03 (p.13) (defining "edge line markings" as "white or yellow pavement marking lines that delineate the right or left edge(s) of a traveled way."). "Longitudinal lines" include both solid and broken lines. *Id.* at § 3A.06.01 (p. 370).

line are each in their own lane; section 545.060’s “safety” element would not even be implicated because neither has left their lane. That is too dangerous to be right.

III. Conclusion

There are traffic offenses written to prohibit movement beyond a painted line.³⁶ Section 545.058 is not one of them. When read together, the plain language of the controlling statutes and legislatively mandated manual on traffic control devices dictate that driving on the “fog line” is driving on the improved shoulder. Even if the court of appeals’s solution were not absurd, the logical gaps it creates are evidence that the Legislature did not intend them. By contrast, placing the stripe marking the edge of the roadway on the pavement next to it—the shoulder—is both simple and consistent with its purpose of keeping drivers on the roadway.

³⁶ See, e.g., TEX. TRANSP. CODE § 545.051(c) (“An operator on a roadway having four or more lanes for moving vehicles and providing for two-way movement of vehicles may not drive left of the center line of the roadway except”); TEX. TRANSP. CODE § 545.055(b) (“An operator may not drive . . . on the left side of any pavement striping designed to mark a no-passing zone.”).

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals reverse the judgment of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of May, 2017, a true and correct copy of the State's Brief on the Merits has been eFiled or e-mailed to the following:

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